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Supreme Court of the United States

OCTOBER TERM 1972

No. 71-1995

GRAYCE E. CAROLLO, PETITIONER,

versus

S. S. KRESGE COMPANY, D/B/A K-MART,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF CASE

Petitioner, a resident of South Carolina, brought suit against S. S. Kresge Company, d/b/a K-Mart, a Michigan corporation, to recover damages for negligence in failing to exercise due care in the maintenance of a portion of its premises in the K-Mart store operated on Jackson Boulevard in Columbia, South Carolina, in which the Petitioner fell on a slippery floor and sustained permanent injuries. At the time of her injuries, Petitioner was employed by Benjamin Kraft and Sons which was operating the millinery department in this store under a License Agreement with the S. S. Kresge Company, d/b/a K-Mart, the essen-

tial terms of which were set forth in the margin of the opinion of the Court below.

For the purpose of consideration of this Petition, the only question involved was whether or not the Petitioner was a "statutory employee" of the Defendant S. S. Kresge Company, d/b/a K-Mart, within the meaning of the South Carolina Workmen's Compensation Statute so as to be barred from bringing this action.

The District Court, in the first trial of this matter, granted the Petitioner's motion to strike the defense interposed by the Respondent to the effect that her remedy was one exclusively under the South Carolina Workmen's Compensation Act. The matter was thereafter submitted to the jury which returned a verdict for Ten Thousand ($10,000.00) Dollars. The trial Court set this aside as being inadequate and granted a new trial only as to the issues submitted to the jury. The matter was thereafter tried by another Judge and jury and resulted in a verdict for the Plaintiff in the sum of Twenty Thousand ($20,000.00) Dollars. Appropriate motions were by both parties and the trial Court declined to disturb the verdict. Appeals were taken to the Fourth Circuit Court of Appeals and that Court determined that the Petitioner, under the undisputed facts, was a "statutory employee" of the Respondent and reversed the trial Court and remanded with instructions to enter judgment for the Respondent.

REASONS FOR DENYING THE WRIT

The decision of the Court below is in accord with the applicable decisions of this Court.

Petitioner contends that the decision of this Court have held that "it is beyond the legitimate function of an appellate court, in reversing the ruling of a District Judge, to deprive a party of the right to controvert material facts and have a trial on the merits, by directing judgment

against him, where such party had no occasion to dispute or controvert the material facts of the opposite party because of the ruling of the District Court." Accepting this as a correct statement of prior holdings of this Court, it avails Petitioner nothing. The fact is that Plaintiff has not been deprived of the right to controvert "material facts". Counsel acknowledged to the Court of Appeals that any reply testimony which he would have presented would have related to the question of K-Mart's control of Kraft's employees. Such would not have been material since it would "only have confirmed what the record already showed", that is, that Petitioner was acutally an employee of Kraft. This, as the Court below held, is not the determinative question. Rather the question is whether Kraft's millinery business was a part of the business of K-Mart, which was that of operating a department store. As the Court below stated, " * * * But if it was to provide, as its ads proclaim, 'clothes for everyone' in a 'one-shop stopping center' [sic] inevitably these integral items of feminine finery had to be made available to its lady customers. K-Mart's arrangement with Kraft, whose business apparently was limited to millinery and handbags, was the method chosen to carry on this part of its business. And as we have seen, in South Carolina it is held that a millinery department operated in a general retail department store by a licensee under terms not materially different from those here involved is a part of the trade, business or occupation of the department store owner within the purview of the statute, Section 72-111. In turn the owner by reason of Section 72-121 is immune to tort liability to the licensee's employees for injuries sustained in the course and scope of their employment."

In short, there was no dispute as to the facts involved and the only question was the legal effect of these undisputed facts. The applicable decisions of this Court hold

that in such a situation the question of employment status is to be determined by the Court. *Walker v. United States Gypsum Co.*, 270 Fed. (2d) 857 (4th Circuit 1959). (*Certiorari* denied 363 U. S. 805, 80 S. Ct. 1240, 4 Lawyers Edition (2d) 1148). *McMullen v. South Carolina Electric & Gas Co.*, 312 Fed. (2d) 662 (*Certiorari* denied 373 U. S. 912, 83 S. Ct. 1302, 10 Lawyers Edition (2d) 413).

The actions of the Court below did not constitute an invasion of the province of the jury contrary to the Seventh Amendment to the United States Constitution.

Petitioner contends that the evidence presented a factual issue as to whether Respondent was engaged in the millinery business and her contention is based upon the erroneous premise that the Court below has chosen between permissible inferences raised by the evidence. It is submitted that under the undisputed facts there was but one reasonable inference which could be drawn. It was alleged and admitted that the Respondent was "engaged in the business of distributing and selling at retail divers goods and merchandise" and that "the defendant in the course of its business was the owner, in control of and maintained a large retail merchandise establishment * * * in which were certain licensed departments, including the millinery department leased by Benjamin Kraft & Sons." As stated by the Court below "That K-Mart was a department store in the ordinary sense of the term is not open to question. That the agreement with Kraft for the operation of the millinery department did not remove that department from the scope of K-Mart's 'trade, business or occupation' as those terms are used in the statute is equally clear." The agreement with Kraft was simply the method by which Respondent chose to handle the millinery portion of its department store business.

Under the undisputed facts and the ruling of the South Carolina Supreme Court in the case of *Adams v.*

Davison-Paxon Co., 230 S. C. 532, 96 S. E. (2d) 566, which case involved an agreement strikingly similar to the agreement here involved, the Court below correctly ruled that Petitioner was a "statutory employee" and barred by the Workmen's Compensation Statutes from maintaining this action.

The action of the Court below is consistent with applicable federal procedure and applicable state law.

The conclusion of that Court was that the evidence and applicable state decisions conclusively showed that the operation of the millinery department was part of the "trade, business or occupation" of K-Mart. In her argument on this point, Petitioner seeks to point out distinctions between the facts in the case of *Adams v. Division-Paxon Co., Supra*, and the facts of the instant case. Certainly there are minor and immaterial differences in such facts, but such distinctions do not change the fact that the operation of a millinery department with respect to the overall operation of a department store, is work "which this employer, or employers in a similar business, would ordinarily do through employees." 1A **Larsen, Workmen's Compensation Law**, Section 49.12 at 859-60.

CONCLUSION

For the reasons set out herein, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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